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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 883

LESLIE FULLARD-LEO AND ELLEN FULLARD-LEO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 348–377) is reported in 133 F. (2d) 743.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered February 1, 1943 (R. 377–378). The petition for a writ of certiorari was filed April 3, 1943. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether title to Palmyra Island was granted to Zenas Bent and Johnson Wilkinson when the island was annexed by the Kingdom of Hawaii in 1862.

2. Whether the presumption of a lost grant may be indulged where there has been only spasmodic possession at long intervals and where the original grant in a complete chain discloses the defect in the claimed title.

3. Whether proceedings to register title in the Land Court of Hawaii, to which the United States was not a party, deprived the United States of its title to Palmyra Island.

STATEMENT

The judgment sought to be reviewed (R. 377–378) reversed a judgment of the district court (R. 51–52) dismissing the Government's petition in a suit brought to quiet title to Palmyra Island. The material facts, as shown by documentary evidence, may be summarized as follows:

Palmyra Island is the name given to a group of about fifty uninhabited coral islets situated about 900 miles south of Honolulu (R. 28). The island was discovered and named by Captain Sawle of the American ship *Palmyra* in 1802 (R. 199). It was visited by Dr. G. P. Judd, of the American Guano Company, in 1859 and claimed by him as a guano island (R. 248, 162, 160–161). But it

was not annexed by any nation until 1862 (R. 28). In that year Palmyra Island was the subject of a petition submitted to King Kamehameha IV of the Hawaiian Islands by Zenas Bent and Johnson Wilkinson, naturalized Hawaiians (R. 28, 80–82). The petition has been lost, but its substance appears from the minutes of a meeting of the King and his Cabinet Council on February 26, 1862, at which meeting the following action was taken (R. 29, 64):

> P. Kamehameha read a Representation from Z Bent & Mr. Wilkinson, about the Island Palmyra, requesting that the Island should be considered a Hawaiian possession & be placed under the Hawaiian Flag
>
> After some discussion it pleased the King to direct the Minister of the Interior, to grant what the Petitioners apply for, *following the precedent of the Resolution regarding the Island Cornwallis & without exceeding the same.*[1]

The precedent regarding Cornwallis Island (also known as Johnson's Island) had been established four years earlier by the following events: On May 24, 1858, E. P. Adams asked authority to take possession of certain guano islands he believed to exist in the North Pacific "providing that the Government [of Hawaii] will grant to him seven eights of said island or islands (reserving to themselves one eighth)" (R. 41, 90). The request was refused. Instead, Adams was given,

[1] Italics are supplied throughout this brief.

by a contract dated May 31, 1858, a five-year exclusive right to take guano from any islands which might be found by his navigator Samuel C. Allen, captain of the schooner *Kalama* (R. 40, 93–96). On that same day a commission was issued authorizing Allen to take possession of such discoveries in the King's name (R. 40, 168–169). On June 14, 1858, Allen took possession of Cornwallis Island with the usual formalities, and in July of 1858 submitted a report of his expedition to the Minister of Interior, Prince Lot Kamehameha (R. 40, 41, 171–173). The Privy Council thereupon resolved that Cornwallis Island was "to be considered as part of His Majesty's Domain" (R. 107–108).[2]

The Council having approved the expedition to Palmyra following and without exceeding the Cornwallis precedent, the Minister of Interior authorized Bent to take possession of Palmyra, enclosing a commission (R. 31) in the same form as that used by Allen four years before (R. 69–71, 168–169). On April 15, 1862, Bent visited Palmyra, took possession according to his di-

[2] This attempted annexation failed because no one was left in possession of the island, with the result that a month after Allen's visit possession was taken and maintained on behalf of the United States. 9 Op. A. G. 364. On Allen's arrival at the island he had destroyed evidences which he found there of prior claims on behalf of the United States, but he did not advise of this in his report to the King. On subsequently learning of this, Prince Kamehameha declared the Adams contract void (R. 40, 42, 154–157).

rections, and left five men on the island (R. 32–33, 74–75). These acts having been reported to the Minister of Interior (R. 32–33, 74–75), annexation was formally proclaimed by him on June 18, 1862 (R. 34, 83):

> Whereas, on the 15th day of April, 1862, Palmyra Island, in latitude 5° 50′ North, and longitude 161° 53′ West, *was taken possession of,* with the usual formalities, by Captain Zenas Bent, he being duly authorized to do so, *in the name of Kamehameha IV.,* King of the Hawaiian Islands. Therefore, This is to give notice, that the said island, so taken possession of, is henceforth to be considered and respected *as part of the Domain of the King* of the Hawaiian Islands.

In December of that year Bent sold to Wilkinson his interest in their partnership and "All my right, title and interest in and to *all the property* of whatever description now lying or situated *on* Palmyra Island in the Pacific Ocean which island by proclamation of His Majesty Kamehameha IV at present *belongs* to the Hawaiian Kingdom" (R. 35–36, 122). In 1866 Wilkinson executed a will leaving his rights in Palmyra to his wife Kalama (R. 36, 127).

On June 15, 1885, two of Kalama's heirs deeded Palmyra to W. L. Wilcox who soon conveyed it to the Pacific Navigation Company by deed recorded August 27, 1885 (R. 37; United

States Exhibits Q, R, original). On that day the deed from Bent to Wilkinson was recorded, having been acknowledged a month earlier by a person familiar with Bent's handwriting (R. 123).

In 1898 Palmyra was annexed by the United States as one of the Hawaiian group (R. 133–134). Under that transfer, the fee title to all public lands of the Hawaiian Government was conveyed to the United States, it being subsequently provided that such lands should be administered by the Territorial Government until Congress otherwise directed. 48 U. S. C. sec. 511. In 1905 the Attorney General of Hawaii reported to the Governor of the Territory upon certain islands, including Palmyra, advising him in part as follows: "I believe that from these records the government's right to lease the islands, or any privileges thereon, is clear" (R. 297–299).

In 1912 Henry E. Cooper, the successor in interest of Wilkinson, instituted proceedings to obtain a guaranteed title pursuant to the Torrens system in force in the Territory. The examiner reported unfavorably on the ground that the petitioner had failed to show a conveyance from the Government.[3] After a trial the Land Court

[3] For the convenience of the Court the relevant portions of the examiner's report which appears in United States Exhibit CC, original, are set out in the appendix, *infra*, pp. 20–21.

granted registration (R. 4, 16), the Territory having filed a disclaimer (R. 374). The court assumed without discussion that Wilkinson possessed a fee title in 1866. At about the same time that he instituted these proceedings, Cooper asked Governor Frear to have a United States vessel proceed to the island and confirm the claim of American sovereignty (R. 199–204), and Governor Frear sent the request to Washington (R. 194–197).

Congress having authorized the construction of naval aviation facilities on Palmyra by the Act of April 25, 1939, c. 87, 53 Stat. 590, the present suit to quiet title to the island was accordingly instituted, the complaint alleging that the island had been annexed by the Kingdom of Hawaii in 1862, that title thereto had never been granted to anyone, and that the United States acquired ownership of the island in 1898 (R. 2–6).[4] Appellees' answers admitted annexation of Palmyra in 1862 by Hawaii but denied that ownership was transferred to the United States and alleged that they had title (R. 9–26).

After examining the documentary evidence introduced by the parties, the district court filed findings of fact and conclusions of law[5] and en-

[4] Whatever rights Bent and Wilkinson had were transferred by mesne conveyances to Cooper, who in 1922 transferred his rights in all except two of the islets to the Fullard-Leos (R. 129–130).

[5] The findings included the district court's opinion. The facts were first summarized (R. 28–39) and then the court

tered judgment dismissing the action (R. 28–52). The circuit court of appeals reversed, holding that the Hawaiian Kingdom acquired title in 1862 and that such title was ceded to the United States in 1898 (R. 357–360).

ARGUMENT

This case is, in petitioners' words (Pet. 5), *sui generis*. Thus it presents no conflict of decisions and moreover is correct.

1. Petitioners assert that Bent and Wilkinson occupied Palmyra Island "in the late 1850's," some years before its annexation[6] by Hawaii in 1862 (Pet. 2, 5–6, 10, 12–13), and that under international law their private rights must be respected by the annexing sovereign (Pet. 12). Assuming the facts to be as petitioners assert, nevertheless the principle that private title will be respected when territory is transferred from one sovereign to another has no application here. Although the existence of Palmyra Island was known as early as 1802 it was not occupied by any established

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reviewed the contentions and stated its opinion as to the principles of law involved (R. 39–50).

[6] The only evidence of this is a passing reference in Cooper's letter of 1912 to Governor Frear (R. 199). On the other hand, G. P. Judd, an American guano merchant, visited Palmyra in October 1859, found no evidence of occupation, claimed the island for the United States, and left (R. 159–161, 248).

government until its annexation by Hawaii in 1862. Prior to such annexation it was *res nullius.* "All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation." Lawrence, *Principles of International Law* (7th ed. 1923) p. 148.

When Bent and Wilkinson, two naturalized Hawaiians, took possession of the island in the name of King Kamehameha IV in 1862, under established principles of international law title vested in the Government of Hawaii. *Johnson* v. *McIntosh,* 8 Wheat. 543 (1823); *Martin* v. *Waddell,* 16 Pet. 367 (1842); *American Guano Company* v. *United States Guano Co.,* 44 Barb. 23 (N. Y. 1865); 3 Washburn, *Real Property* (6th ed. 1902) sec. 2000, p. 166; 1 Moore, *International Law Digest* (1906) pp. 258–268; 9 Op. A. G. 364 (1859); Lawrence, *Principles of International Law* (7th ed. 1923) p. 148. Thus, in *Martin* v. *Waddell, supra,* the Court said (pp. 409–410):

> * * * if the discovery be made and possession taken under authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the na-

> tional domains; by that organ, in which all territory is vested by law.[7] * * *

Whether individuals who have been in possession of land thus annexed (assuming Bent and Wilkinson to have been in possession) will be accorded any rights is a matter for the occupying Government to decide (cf. Pet. 12). Thus, the Indians in the Western Hemisphere retained only such legal rights as the particular sovereign—England, France, or Spain, gave or recognized. Title having vested in the Government of Hawaii in 1862 it remained there unless subsequently conveyed away. As petitioners claim title through Bent and Wilkinson, they must show a subsequent grant from that Government of the fee simple title to Bent and Wilkinson.

The documents relied upon by petitioners do not constitute the necessary grant. Rather than establishing a grant to Bent and Wilkinson the proclamation of annexation (R. 83) and other evidence affirmatively shows that the King was

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[7] "Discovery" under this rule does not, as petitioners assume (Pet. 11), mean the first disclosure of existence of the land, but rather it refers to the first occupation by an established government. Thus, although the existence of the North American continent was made known in 1498, or earlier, title by "discovery" was created when the various localities were thereafter occupied by England, France, Spain, and Holland. See *Johnson* v. *McIntosh*, supra, at p. 574, where reference is made to the acquisition of sovereignty by the nations over areas of North America based on "discovery"; these "discoveries" were long after Cabot and Vespucci discovered the North American continent.

retaining a fee simple title for the Hawaiian Government. Bent, as agent of the King, was authorized to take possession of Palmyra in the name of the King (R. 71–72). This was done (R. 74) and the island was proclaimed "as part of the Domain of the King of the Hawaiian Islands" (R. 83). "Domain" means land owned by a sovereign; for example, "public domain" means lands owned by the United States. *Barker* v. *Harvey,* 181 U. S. 481, 490; *People* v. *Shearer,* 30 Cal. 645 (1866); Black, *Law Dictionary* (3rd ed. 1933, pp. 606–607); Webster's *New International Dictionary* (2nd ed., p. 768). Evidently the Americans who carried the English language with them to Hawaii caused the Hawaiians to use "domain" in the same sense. In the Act of June 7, 1848 (Hawaii Civil Code (1859), pp. 374–375), when, in connection with abolition of feudal tenures, the King gave to the nation "the greater portion of his Royal Domain," the words "royal domain" obviously meant the royal lands.[8] Any doubt as to the meaning of "domain" standing alone (see R. 366) disappears when reference is made to the "precedent of the Resolution regarding the Island Cornwallis." In that case, the King had refused to grant a fee simple in seven eighths of the island and instead had given a five-year con-

[8] Hawaii at this time generally followed English and American law and the English version of the 1859 Code was controlling. Hawaii Civil Code (1859), sec. 1493. See *Territory* v. *Liliuokalani*, 14 Hawaii 88, 101.

tract right to extract guano. The resolution of the Privy Council made this refusal effective by declaring that the island was "to be considered part of His Majesty's Domain" (R. 107–108). The specific reference to the Cornwallis precedent and the use of the same language in the annexing resolution show that the King intended to retain for Hawaii the fee simple title to Palmyra Island.

Hawaii possessed, at the time, an established system of recording conveyances (Hawaii Civil Code, 1859, secs. 1249–1265) and the Minister of Interior who managed the government lands was authorized to sell them, a Royal patent being issued to the purchaser (Hawaii Civil Code, 1859, secs. 39–48). Neither Bent nor Wilkinson ever received such a patent.

Petitioners contend, nevertheless, that Bent and Wilkinson did have title. The argument is divided into two parts. First, petitioners assert that a pre-existing "title by occupancy" was recognized by the King in 1862 (Pet. 10–15). Then they explain (Pet. 23) the condition "following the precedent of the Resolution regarding the Island Cornwallis without exceeding the same" to mean that the king agreed to annex Palmyra "if the island had not previously been taken possession of by any other government or people." The arguments lack factual foundation. Bent's report, after taking possession in the name of the

Hawaiian king, and upon which the proclamation annexing Palmyra was based, did not state whether the island was inhabited or whether there was any evidence of prior occupation (R. 74–75). Clearly, if concern over prior possession by others was what caused the insistence on observance of the Cornwallis condition, the King would not have proclaimed annexation upon the basis of a report which was silent as to such possession. Nor is there any evidence to indicate that the King was recognizing a title by occupancy. Such alleged possession is not referred to in any of the proceedings of annexation (R. 64, 69–71, 74–75, 83). In fact, there was no prior occupation by Bent and Wilkinson. In 1859, Dr. Judd took possession for the American Guano Company and bonded the island under the Guano Act of 1856 (R. 248–250, 162, 159–160, 283–284).[9] Contemporary accounts state that, in 1862, Bent took possession of Palmyra, "an uninhabited spot" (R. 247). And Bent's report of annexation, stating that after taking possession in the name of the King he had planted vegetables, erected a dwelling house and left five men on the Island (R. 74–75), was not written by a person who had been occupying the island for several years. In fact, Wilkinson bought the Sloop *Louisa* in February 1862 in order to annex

[9] This visit failed to constitute annexation because possession was not maintained, 9 Op. A. G. 364 (1859).

Palmyra (R. 68). Petitioners' assertion of prior occupancy is based entirely on the statement contained in Henry E. Cooper's letter in 1912 (Pet. 18–19). Cooper had, a short time before, purchased the island and three months later instituted the Land Court proceedings (R. 199–204). He had no personal knowledge of an event occurring twenty-eight years before the year (1890) when he came to Hawaii (Preston, *American Biographies* (1940)) and the statement is contradicted by the contemporary newspaper accounts which he furnished the Governor at the same time (R. 247–250).[10]

Finally, it does not appear that either Bent or Wilkinson claimed to own the island. In December 1862, their partnership was dissolved and Bent assigned to Wilkinson his right, title, and interest to property "now lying or situated *on* Palmyra Island" which "at present belongs to the Hawaiian Kingdom" (R. 122). This is not the language which would be used by an absolute owner of the island. Instead it is the very language which would be used by one claiming merely

[10] Further doubt is cast upon this self-serving statement by the fact that the letter enclosed a copy of the minutes of the Cabinet Council meeting from which the chain of title originated, but that copy omitted the limitation "following the precedent of the Resolution regarding the Island of Cornwallis & without exceeding the same" (R. 240–241). Cooper apparently inspected the minutes for he borrowed the file on Palmyra from the Territorial Archives in June 1911 and returned it in December of that year (R. 77).

a five-year right to remove guano from the island. Moreover, this assignment was not acknowledged as a deed and recorded until 1885, after the death of both Bent and Wilkinson (R. 123). When Wilkinson made his will in 1866, he did not devise the island as an absolute owner would. Rather, his will indicates that he bequeathed a leasehold estate in the island (R. 127).

It is evident, therefore, that the decision of the court below holding that the Hawaiian Kingdom did not grant fee simple title to Bent and Wilkinson in 1862 was correct.

2. Being unable to establish a grant of Palmyra, petitioners bring forth the common law presumption of a lost grant. This presumption cannot apply here, for there is no gap in the chain of the alleged title which that grant might supply. The chain of title from Bent's assignment, which specifically refers to the proclamation of annexation (R. 122), to the petitioners is complete. The presumption is not a rule of law but a factual inference which is subject to rebuttal (*In re Title of Kioloku,* 25 Hawaii 357), and here it is rebutted by the known fact that the original grantee from whom title is claimed had only a five year *profit a prendre,* not a title in fee simple. The presumption cannot be used to cure a defect in one of the deeds composing a complete chain of title. *Houston Oil Co.* v. *McCarthy,* 245 S. W. 651 (Tex., 1922); *Dolbear* v. *Gulf Production Co.,*

268 Fed. 737 (C. C. A. 5), certiorari denied, 255 U. S. 569; *Dessaunier* v. *Murphy,* 27 Mo. 48 (1858); *Colvin* v. *Warford, et al., Lessee,* 20 Md. 357 (1863).[11]

Moreover, as the court below held (R. 360), the adverse, exclusive, and interrupted possession, upon which the presumption is based (*United States* v. *Chavez,* 175 U. S. 509, 522), is not present here. A few months after annexation Bent assigned his rights to Wilkinson. It does not appear that Wilkinson ever occupied the island, and in 1866 he executed his will in New Zealand (R. 125), calling himself a "settler" there (R. 126), and naming as executors two residents of New Zealand, one of whom was his brother (R. 126). The Pacific Navigation Company paid taxes only for the years 1885, 1886, and 1887.[12] The Land Court stated that the Company placed a man on the island for about a year at this time "since which date no living soul

[11] *Carino* v. *Insular Government,* 212 U. S. 449 (Pet. 26) is irrelevant, for in the absence of any original grant the court merely inferred the first conveyance from the Government as to land which had been long occupied and cultivated. Moreover, the decision is based in part on the fact that under the Spanish law prescription operated to bar the Philippine sovereign, which is not the Hawaiian law. *Thurston* v. *Bishop,* 7 Hawaii 421, 437.

[12] Contrary to petitioners' assertion (Pet. 25), this payment was not a government recognition of a private title, for, as the tax officials testified, the taxpayer itself placed the lands on the rolls (R. 307) and in many cases taxes have been paid on public lands (R. 308).

has resided thereon" (page 7 of exhibit 28 attached to U. S. Ex. CC original).[13] And during the eighteen years petitioners have claimed ownership, they have spent only thirteen days on the island (R. 276–277). Finally, the fact that in 1912 Cooper sought the assistance of the Government to prevent Great Britain from taking possession indicates that the island was uninhabited during all of this period except for the occasional attempts to produce something of value from it, since actual occupation of the island by Cooper would alone have been sufficient to cause Great Britain to recognize American sovereignty over it.

3. Petitioners assert (Pet. 26–29) that the United States is bound by the Land Court decision registering title under the Torrens system. The Land Court examiner fully investigated the source of the alleged title and, as one ground of his report against registration, stated that no showing was made that the island was private property. The Land Court gave no reason for overruling this report, so it is not possible to tell what the basis was for the decision registering the title.

The United States has not waived its immunity from suit, and hence it could not be joined in the

[13] See also page 6 of Exhibit 23 attached to U. S. Exhibit CC original, in which an Hawaiian newspaper in 1897 stated that the island was annexed by the British in 1889 "finding the place without any inhabitants."

registration proceedings. It follows that it was not bound by those proceedings. Cf. *United States* v. *U. S. Fidelity Co.*, 309 U. S. 506, 514–515. Despite the contrary intimation of the petition (Pet. 28) and of the dissenting judge below (R. 374–376), the territorial courts have recognized that the title registration does not bind the United States. *Land Title, Kalena,* 34 Hawaii 93.[14] Petitioners' counsel, a leading member of the Hawaiian bar of long experience, admitted at the trial that the United States "has never—at any rate, so far as I know—given consent to be sued in the Territorial Land Court * * *" (R. 137; see also R. 121). No contrary contention was advanced in the circuit court of appeals. Thus, petitioners may not now urge that the United States is bound by the Land Court judgment. The decision below will not upset registered titles in Hawaii. In those few instances in which the United States subsequently establishes paramount title the purchaser of the Torrens certificate will be reimbursed from the registration assurance fund. Revised Laws Hawaii (1905), sec. 2489.

[14] The Territory does not have title but merely possession of public lands. Section 91 of Organic Act of April 30, 1900, c. 339, 31 Stat. 159, 48 U. S. C., sec. 511. Its disclaimer merely waived its right to possession. The lands to which the Territory may obtain title (Pet. 27) are limited to public utilities and lands used for similar public purposes.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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